

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Holly J. Olson,

Complainant,

vs.

The St. Paul Chapter, American Red Cross,
a non-profit corporation,
Respondent.

FINDINGS_OF_FACT,
CONCLUSIONS_OF_LAW,
AND_ORDER

The above-captioned matter came on for hearing before Administrative Law Judge Barbara L. Neilson in the courtrooms of the Office of Administrative Hearings in Minneapolis, Minnesota, on December 16, 1991. John Del Vecchio, Attorney at Law, 2469 University Avenue West, St. Paul, MN 55114-1534, appeared on behalf of the Complainant, Holly J. Olson. Marko J. Mrkonich and Lisa M. Bankey, Attorneys at Law, Oppenheimer Wolff & Donnelly, First Bank Building, Suite 1700, St. Paul, Minnesota 55101, appeared on behalf of the Respondent, the St. Paul Chapter, American Red Cross ("Red Cross"). The record closed upon receipt of the last post-hearing briefs on December 26, 1991.

NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2, this Order is the final decision in this case and under Minn. Stat. § 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 through 14.69.

STATEMENT OF ISSUES

The issues in this case are as follows:

- (1) Did the Respondent discriminate against the Complainant in her employment at Red Cross because of her sex?
- (2) Is the Complainant properly entitled to compensatory damages, damages for mental anguish and suffering, punitive damages, or attorney's fees and costs and, if so, in what amounts?
- (3) Should a civil penalty be assessed against the Respondent?

Based upon all the files, records and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Complainant, Holly J. Olson, is a 30-year-old female resident of the state of Minnesota. Ms. Olson was employed by Red Cross on three occasions during 1985 to 1990.

2. Ms. Olson was first employed by Red Cross as a Temporary Medical Laboratory Technician in the Components Lab from June 3, 1985, to approximately February, 1986. Ms. Olson voluntarily resigned when the temporary position terminated. (Exs. 3, 5, and 6.)

3. Ms. Olson was next employed by Red Cross as a Permanent Rotating Medical Laboratory Technician in the Processing Lab from November 3, 1986, to approximately November, 1988. Ms. Olson underwent emergency surgery in November of 1988 and voluntarily resigned from this position at that time. She then pursued a full-time career in real estate. (Exs. 4, 5 and 6.)

4. Ms. Olson's third and final period of employment with Red Cross was from March 12, 1990 until November 12, 1990, in a full-time position as a Temporary Medical Laboratory Technician in the Components Lab. In October of 1990, Ms. Olson received notice that the position would terminate on November 23, 1990. Ms. Olson voluntarily resigned from this position eleven days before the position was scheduled to terminate. (Exs. 6, 7, 159, and 167.)

5. During Ms. Olson's employment, a sexual harassment policy was in place at Red Cross. The policy indicated that Red Cross would not tolerate sexual harassment in the work place, that employees found to have violated the policy would be subject to appropriate disciplinary action including discharge, and that incidents reported would be investigated and appropriate action would be taken. Sexual harassment was

6. The Red Cross sexual harassment policy was disseminated to Red Cross employees and given to new employees during their orientation sessions. Attorneys have spoken to Red Cross managerial personnel regarding implementation of the policy. Ms. Olson was given a copy of the policy in a staff meeting, had read it, and was familiar with its provisions.

7. Although the Red Cross sexual harassment policy does not require written complaints to be filed, Ms. Olson understood that a written complaint would prompt a more formal response than an oral complaint.

8. During her third period of employment with Red Cross from March 12, 1990, to November 12, 1990, Ms. Olson worked in the Components Lab with Warren Eichner, a non-supervisory male co-worker.

9. The atmosphere in the Components Lab was one in which the Medical Laboratory Technicians played music, talked, and joked around. Some of the jokes were sexual in nature. Ms. Olson once told David Peterson, a co-worker in the Components Lab, that having sex with his wife would constitute assault with a dead weapon.

10. Mr. Eichner frequently stated in conversation, "That's a woman for you."

11. In July of 1990, Ms. Olson heard Mr. Eichner state in a sarcastic, flippant tone of voice that "women are only good for one thing" and that women did not belong in the work force, should not work outside the home, and should remain "barefoot and pregnant." (Ex. 9.)

12. In approximately mid-July or mid-August of 1990, Ms. Olson heard Mr. Eichner say that "all women ever do is nag, nag, nag." (Ex. 9.)

13. A few days after Mr. Eichner made the "nag, nag, nag" comment, Ms. Olson, Mr. Eichner and a female co-worker (Lynn Peters) were working in the Components Lab. Mr. Eichner was wearing a surgical mask. When Ms. Peters was about to leave, Mr. Eichner commented to Ms. Peters in a suggestive tone of voice, "Maybe you should stay, Lynn. You don't know what I'm going to do to [Ms. Olson] under this face mask."

14. In late July of 1990, Ms. Olson met with her supervisor, Donna Franceschetti, to complain about Mr. Eichner. Ms. Olson told Ms. Franceschetti that she did not like Mr. Eichner's conduct or attitude and that Ms. Franceschetti needed to talk to Mr. Eichner about his attitude, language and behavior in the lab. Ms. Olson said that Mr. Eichner complained about work, was using vulgar language, was being rude and offensive, and had a bad temper. She told Ms. Franceschetti that Mr. Eichner's behavior was making her upset. Ms. Olson did not use the term "sexual harassment" or describe specific remarks made by Mr. Eichner when she spoke with Ms. Franceschetti. Ms. Franceschetti said she would speak with Mr. Eichner and Ms. Olson responded that would be "O.K."

15. Ms. Franceschetti talked with Mr. Eichner concerning his attitude toward work and his temper soon after her discussion with Ms. Olson. She told Mr. Eichner that he needed to be able to channel his anger appropriately without showing anger or talking under his breath. Mr. Eichner said he may have made inappropriate remarks and would try not to do so in the future.

16. After Ms. Franceschetti spoke with Mr. Eichner, he returned to the Components Lab, told his co-workers that he had just been "talked to about [his] attitude and behavior," and laughed. Ms. Olson did not report this to Ms. Franceschetti.

17. Sometime in August, 1990, Mr. Eichner, Ms. Olson, Ms. Peters, and two male co-workers had a conversation about cooking. Mr. Eichner commented that he would like to have a woman on his table for his dinner. (Ex. 9.) Ms. Olson was in tears, and felt uncomfortable and humiliated following Mr. Eichner's remark. She and Ms. Peters took a break shortly after the comment was made.

18. On August 24, 1990, Mr. Eichner, Ms. Peters and Ms. Olson discussed the possibility that Barbara McHugo, a co-worker, wanted to apply for an opening on the evening shift. Mr. Eichner

19. In late August of 1990, Ms. Olson again met with Ms. Franceschetti and told her that Mr. Eichner had made some comments about women, Ms. McHugo was upset about it, and Ms. McHugo and Mr. Eichner were arguing. Ms. Olson did not tell Ms. Franceschetti the actual comments that Mr. Eichner had made, and did not use the term "sexual harassment" when she spoke with Ms. Franceschetti.

Ms. Franceschetti said she would talk to Mr. Eichner right away and Ms. Olson said, "O.K."

20. Ms. Franceschetti talked to Mr. Eichner later the same night. She told him that she had heard he had made some comments about women and had been arguing with Ms. McHugo. Mr. Eichner said that they had just been kidding around. Ms. Franceschetti told Mr. Eichner that he should not make comments about women or other employees.

21. When Mr. Eichner returned to the Components Lab after his discussions with Ms. Franceschetti, he laughed and said, "I just got talked to by Donna again." Ms. Olson did not report this to Ms. Franceschetti.

22. In late August or early September of 1990, a Red Cross employee came into the lab looking for co-worker Mary Clare Hunt. Ms. Olson directed the person to Ms. Hunt. When Ms. Olson returned, Mr. Eichner said words that sounded like "my cunt, my cunt." Mr. Eichner was in fact repeating a line from the movie Porky's in which a character paged "Mike Hunt, Mike Hunt." Ms. Olson had not seen the movie and was shocked that Mr. Eichner made this comment. She started crying and left the lab to take her break. She blurted out to those standing near the door, "Someone had better go in and get that guy out of there. I'm not going back." Ms. Olson did, however, return to the lab after her break and finished her shift. (Ex. 9.)

23. At some point during Ms. Olson's third period of employment with Red Cross, she told Mr. Eichner, "You can't talk that way about me and other women. You're going to make someone angry." Mr. Eichner responded that he had "freedom of speech."

24. On September 7, 1990, Ms. Olson filed a written internal complaint of sexual harassment against Mr. Eichner. (Ex. 9.) Ms. Olson gave the complaint to supervisor Carole Grono, who in turn gave the complaint to B. J. Hockinson, Assistant Director, Technical Services. Ms. Olson chose to delay submitting the written complaint until after a position for which both Ms. Olson and Mr.

Eichner had applied was announced and Mr. Eichner was awarded the position.

25. In her written complaint, Ms. Olson alleged that she had brought the accusations to the attention of Ms. Franceschetti on at least two occasions and that, despite several verbal warnings, Mr. Eichner considered the situation a joke and continued to display what Ms. Olson felt was very rude and offensive conduct and language. Ms. Olson indicated that she found Mr. Eichner's comments "very upsetting" and that she believed that Red Cross should take more severe action to remedy the situation. Attached to the two-page complaint was a two-page list referring to the comments set forth in Findings Nos. 11, 12, 17, 18, and 22 above. Ms. Olson indicated in her written complaint that Mr. Eichner had "several times" made comments to the effect that women were good for only one thing and should be kept barefoot and pregnant and not work outside the home. The written complaint did not mention the face mask incident or the "that's a woman for you" remarks set forth in Findings Nos. 13 and 10 above. (Ex. 9.)

26. When she learned of the written complaint, Ms. Franceschetti told Ms. Olson that she was glad Ms. Olson had had the courage to bring the allegations forward. Ms. Franceschetti also said, "Holly, you never told me these comments before, anything like this." Ms. Olson's only response to this was that it had taken her awhile to decide to report the comments. Ms. Olson also told Ms. Franceschetti that she did not want to have Mr. Eichner fired but just wanted him to take the issue seri

27. Upon receipt of the complaint on September 7, 1990, Ms. Hockinson turned the matter over to John Steenerson, Director of Human Resources, for investigation under the sexual harassment policy. Mr. Steenerson drafted an action plan with respect to the complaint. (Ex. 136.) He interviewed nine individuals during the investigation, including Ms. Olson, Mr. Eichner, their supervisors, and several co-workers.

28. Upon completion of the investigation, Mr. Steenerson concluded that Mr. Eichner's comments were offensive and inappropriate for a work setting.

29. In a memorandum dated September 21, 1990, Mr. Steenerson notified Mr. Eichner of the results of the investigation and informed him that disciplinary measures were required. The memorandum states, inter alia, as follows:

I have determined that the manner in which you have referenced women, the jokes being told of a sexual nature, the disrespect shown when informed of your conduct or language have upset a number of your colleagues and have created an offensive work environment. While you may not have acted singularly in this activity, you are accountable for your actions and must accept

responsibility for what has occurred. Some of the claims were confirmed and you have admitted to me to have been a part of these incidents. You were also verbally warned by your supervisor, Donna Franceschetti, about the comments you have made toward women. You have communicated a general feeling of disrespect toward your female counterparts in the laboratory and antagonized a few to the point where they prefer not to work with you. This attitude of disrespect creates an unproductive and hostile environment which cannot be tolerated.

The jokes and language used by you and some others is offensive and totally inappropriate for a work setting. This has been brought to your attention by your co-workers and you have not regarded it as serious.

Your language and general attitude of disrespect toward the female staff in the lab is not acceptable, and cannot continue. Further evidence of continuance of this behavior will be grounds for immediate termination. Any retaliation toward a co-worker regarding this charge will also result in termination.

(Ex. 11.) The memorandum further provided that another confirmed offense would result in termination, Mr. Eichner should not engage in any reprisal as a result of the investigation, and Mr. Eichner would be required to spend a minimum of one session with a counselor to discuss work place behaviors at the expense of Red Cross. Mr. Steenerson indicated that the memorandum would be retained in a confidential envelope in Mr. Eichner's personnel file and removed after 24 months if no further incidents were reported.

30. In a memorandum dated September 24, 1990, Mr. Steenerson notified Ms. Olson of the results of the investigation. The memorandum indicated that, "[f]or the most part, and to varying degrees, your complaint was confirmed and supported by those I spoke with. As a result, we have taken measures with Warren to correct this situation and do not expect to have a repeat incidence or reprisal. Thank you for bringing this situation to our attention and we hope that your report and the subsequent investigation serves to make your work setting more respectful and productive." (Ex. 10.)

31. In October of 1990, Ms. Olson applied for three open Medical Laboratory Technician positions at Red Cross. One of the positions for which she applied would have required her to continue to work with Mr. Eichner.

32. On approximately October 23, 1990, selections for the new positions were announced. Ms. Olson did not receive any of the positions for which she had

33. On her last day of employment with Red Cross, or earlier that week, Ms. Olson overheard a co-worker, David Peterson, say to Mr. Eichner, "Aren't you glad that she [Ms. Olson] will be leaving?" Ms. Olson began crying when

she heard the remark. Mr. Peterson apologized to her.

34. Ms. Olson's temporary position was scheduled to terminate on November 23, 1990. During her shift on November 12, 1990, Ms. Olson abruptly walked off the job. She did not inform anyone on November 12 that she was leaving or provide any advance notice of her decision to resign the position. At the time of her resignation, Ms. Olson earned \$10.24 per hour. (Ex. 12.)

35. Ms. Olson began working at a job at Metropolitan Ob-Gyn as a Medical Assistant on February 20, 1991. She was hired at a rate of \$8.00 per hour. Her wages were increased to \$8.50 per hour on May 20, 1991, and have remained at that level until the present time. During her employment with Metropolitan Ob-Gyn, Ms. Olson has worked an average of approximately 27.75 hours per week. (Exs. 13, 14.)

36. Ms. Olson filed a charge of discrimination against Red Cross with the Minnesota Human Rights Department on or about December 12, 1990. In her charge, she alleged that Red Cross had discriminated against her on the basis of sex and had engaged in an act of reprisal for filing a complaint regarding sexual harassment by denying her the rotating Processing Medical Laboratory Technician position.

37. Because the Department of Human Rights had not issued a determination with respect to Ms. Olson's charge of discrimination within 180 days from the filing of the charge, Ms. Olson requested that a hearing be held before an Administrative Law Judge pursuant to Minn. Stat. § 363.071, subd. 1a (1990).

38. On October 15, 1991, a Notice of and Order for Hearing was issued in this matter.

39. Prior to the start of the hearing in this matter, Ms. Olson withdrew her claim that she was not hired for the Processing Medical Laboratory Technician position due to illegal reprisal for complaining of sexual harassment.

40. Mr. Eichner's behavior changed after the written complaint was filed and investigated, and he did not engage in any behavior after that time which Ms. Olson found objectionable. No further complaints have been received from any other Red Cross employee concerning Mr. Eichner.

41. Ms. Olson was satisfied with the manner in which Red Cross handled her written complaint of sexual harassment.

42. The parties agreed that service of the decision of the Administrative Law Judge by first class mail would be satisfactory, and waived the requirement

set forth in Minn. Stat. § 363.071, subd. 2 (1990), for personal service on the Respondent and service by registered or certified mail on the Complainant.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law has jurisdiction herein and authority to take the action ordered under Minn. Stat. §§ 14.50 and 363.071 (1990).

2. The Notice of and Order for Hearing was proper as to form, content, and execution, and all other relevant substantive and procedural requirements of law and rule have been satisfied.

3. The Respondent, Red Cross, is an "employer" for purposes of Minn. Stat. § 363.01, subd. 17 (1990).

4. The Complainant, Holly J. Olson, was an "employee" within the meaning of Minn. Stat. § 363.01, subd. 16 (1990).

5. The Complainant has the burden of proof to establish by a preponderance of the evidence that the Respondent engaged in unlawful discrimination.

6. The Minnesota Human Rights Act prohibits covered employers from discharging or discriminating against an employee with respect to terms, conditions, or privileges of employment because of sex, except when based on a bona fide occupational qualification. Minn. Stat. § 363.03, subd. 1

7. Pursuant to Minn. Stat. § 363.01, subd. 14, discrimination based on sex includes sexual harassment. "Sexual harassment" is defined to include "verbal or physical conduct or communication of a sexual nature when . . . that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, . . . or creating an intimidating, hostile or offensive employment . . . environment; and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely inappropriate action." Minn. Stat. § 363.01, subd. 41.

8. A cause of action arises for damages under the Minnesota Human Rights Act in situations where an employee has been constructively discharged, i.e., where the employee has "resign[ed] in order to escape intolerable working conditions caused by illegal discrimination." *Continental Can Company vs. State*, 297 N.W.2d 241, 251 (Minn. 1980); see also *Danz vs. Jones*, 263 N.W.2d 395, 403 n.4 (1978) ("a resignation which is caused by illegal discrimination is a constructive discharge"); *Wheeler v. Southland Corp.*, 875 F.2d 1246, 1249-50 (6th Cir. 1989) (if a reasonable employer would have foreseen that the

employee would resign in the light of the treatment she was receiving, a constructive discharge claim will lie).

9. The Complainant has proven a prima facie case of discrimination.

10. The Respondent has articulated legitimate, non-discriminatory reasons for its treatment of the Complainant and its handling of the Complainant's informal and formal complaints concerning her co-worker, Warren Eichner.

11. The Complainant has failed to prove that the reasons advanced by the Respondent are mere pretexts for discrimination.

12. The Respondent took timely and appropriate action to remedy the sexual harassment against the Complainant.

13. The Complainant failed to establish that she was constructively discharged by the Respondent from her temporary position.

14. The Complainant failed to prove by a preponderance of the evidence that the Respondent discriminated against her in violation of Minn. Stat. § 363.03, subd. 1(2) (1990).

15. The Complainant's charge of discrimination should be dismissed on the merits.

16. The reasons for the foregoing Conclusions of Law are set out in the Memorandum which follows and which is incorporated into these Conclusions of Law by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED: That this matter be dismissed with prejudice.

Dated this 27th day of January, 1992.

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

Reported: Tape Recorded (four tapes).

MEMORANDUM

The Complainant in this case alleges that the Respondent violated the Minnesota Human Rights Act ("MHRA") by failing to take prompt and appropriate action to remedy sexual harassment of the Complainant by a co-worker, Warren Eichner. The Complainant apparently also alleges that she was, in effect, constructively discharged from her temporary position as a Medical Laboratory Technician in the Components Lab because she found it intolerable to continue working with Mr. Eichner. At the start of the hearing, the Complainant

withdrew her claim that the Respondent had illegally retaliated against her for complaining of the harassment when it decided not to select her to fill an open Medical Laboratory Technician position in the Processing Lab.

The MHRA provides that, "[e]xcept when based on a bona fide occupational qualification, it is an unfair employment practice . . . [f]or an employer, because of . . . sex, . . . to discharge an employee; or . . . to discriminate against

The Minnesota Supreme Court has often relied upon federal case law developed in discrimination cases arising under Title VII of the Civil Rights Act of 1964 in interpreting the MHRA. Specifically, the Supreme Court has adopted the method of analysis of discrimination cases first set out in McDonnell_Douglas_Corp._v._Green, 411 U.S. 792, 802-03 (1973). See, e.g., Danz v._Jones, 263 N.W.2d 395, 399 (Minn. 1978); Sigurdson_v. Isanti_County, 386 N.W.2d 715, 719 (Minn. 1986). The approach set forth in McDonnell_Douglas consists of a three-part analysis which first requires the complainant to establish a prima facie case of disparate treatment based upon a statutorily prohibited discriminatory factor. Once a prima facie case is established, a presumption arises that the respondent unlawfully discriminated against the complainant. The burden of producing evidence then shifts to the respondent who is required to articulate a legitimate, non-discriminatory reason for its treatment of the complainant. If the respondent establishes a legitimate, non-discriminatory reason, the burden of production then shifts to the complainant to demonstrate that the respondent's claimed reasons are pretextual. Anderson_v._Hunter_Keith_Marshall_and_Co., 417 N.W.2d 619, 623 (Minn. 1989). The burden of proof remains at all times with the complainant. Fisher_Nut_Co._v._Lewis_ex_rel._Garcia, 320 N.W.2d 731 (Minn. 1982); Lamb_v. Village_of_Bagley, 310 N.W.2d 508, 510 (Minn. 1981).

The elements of a prima facie case of discrimination vary depending upon the type of discrimination alleged. A prima facie case of sexual harassment is established by showing that:

- (1) The employee is a member of a protected class;
- (2) The employee was subjected to unwelcome sexual harassment;
- (3) The harassment complained of was based on sex;
- (4) The harassment affected a term, condition, or privilege of employment or created an intimidating, hostile, or offensive working environment; and
- (5) The employer knew or should have been aware of the harassment.

Bersie_v._Zycad_Corp., 399 N.W.2d 141, 146 (Minn. App. 1987), citing Henson_v. City_of_Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982).1/ The actions underlying a sexual harassment claim "need not be clearly sexual in nature Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances." Hall_v. Gus_Construction_Co., 842 F.2d 1010, 1013-14 (8th Cir. 1988) (citations omitted). Courts construing Title VII of the Civil Rights Act of 1964 have held that an employer must provide a work environment free of intimidation, ridicule or disrespect based on an employer's race or sex. See 3 Larson,

Employment_Discrimination § 84.00 (1991); see also *Snell_v._Suffolk_County*, 611 F.Supp. 521 (E.D.N.Y. 1985), *aff'd*, 782 F.2d 1094 (2d Cir. 1986).

Based upon a careful consideration of the record as a whole and relevant case law, the Administrative Law Judge has concluded that the Complainant established at least a marginal prima facie case of sexual harassment. The evidence presented at the hearing showed that the Complainant is a protected class member who was employed by the Respondent and that she was subjected to repeated unwelcome verbal conduct based on sex. Although this case presents a close question, the Judge is also persuaded (despite the Respondent's arguments to the contrary) that this conduct was sufficiently pervasive to create a hostile or offensive working environment. The evidence established that, over a two-month period of time, Mr. Eichner made remarks that women are only good for one thing; women do not belong in the work force; women should not work outside the home; women should remain barefoot and pregnant; and all women ever do is nag. Mr. Eichner also referred to a female co-worker as a bitch; stated that he would like to have a woman on the table for his din

1/ In its post-hearing brief, the Respondent includes as part of the fifth element of a prima facie case of sexual harassment a requirement that the employer be shown to have failed to take prompt, remedial action. The Court of Appeals in *Bersie* did not explicitly require such a showing as part of the complainant's prima facie case. Of course, it is clear that the employer may avoid liability for sexual harassment of an employee by a non-supervisory co-worker by demonstrating that it took timely and appropriate remedial action. Minn. Stat. § 363.01, subd. 41 (1990). The timeliness and propriety of the remedial action taken by Red Cross will be evaluated in considering whether the Respondent has articulated legitimate, non-discriminatory reasons for its treatment of the Complainant in this case.

2/ The Complainant testified at the hearing that a co-worker, Barbara McHugo, reported to the Complainant that Mr. Eichner had called the Complainant an "ugly dog" and a "bitch." Ms. McHugo was not called as a witness. The Respondent's objections to this testimony on the grounds of unreliable hearsay were well-founded, and this alleged remark has not been considered in deciding this case.

occasional use of offensive language. The Complainant testified that she was frequently alone with Mr. Eichner in the Components Lab. Mr. Eichner apparently made the "my cunt" remark directly to the Complainant when she was standing three or four feet away from him. The mere fact that other individuals may have been present when certain of the offensive comments were

made does not provide persuasive evidence that the comments were not in fact directed at the Complainant, particularly where the others present frequently were males and the Complainant's discomfort with the remarks apparently was obvious at times. In addition, the mere fact that the Complainant may have participated from time to time in the joking atmosphere that prevailed in the lab and that she made a sexual joke on one occasion to a co-worker other than Mr. Eichner is not sufficient to show that she welcomed Mr. Eichner's comments or was not offended by them, in light of evidence to the contrary.

Significantly, the Respondent itself concluded in its investigation of the

Complainant's internal complaint that Mr. Eichner's conduct had created an offensive and unproductive work environment and that his jokes and language were offensive and totally inappropriate for a work setting. (Ex. 11.)

These

remarks are obviously extremely chauvinistic, demeaning to women, and sexually

derogatory. Such conduct simply cannot be excused as a poor attempt at humor.

As Judge Lansing has noted, "The [Minnesota Human Rights] Act does not contain

an exception for derogatory remarks that are intended to be funny, and creating

such an exception here would substantially destroy the Act's purpose of protecting women from offensive conduct affecting employment conditions."

Bersie v. Zycad Corp., 417 N.W.2d 288, 293 (Minn. App. 1987) (Lansing, J., dissenting). Although she did not seek medical treatment, Mr. Eichner's remarks clearly had a significant effect on the Complainant's conditions of employment. The comments caused the Complainant distress and made her angry and uncomfortable, and she left the lab in tears and took breaks from her work

after the "woman on the table" and the "my cunt" remarks were made. The Complainant and Lynn Peters (a friend and co-worker) testified that they and other women avoided going to or staying in the lab due to Mr. Eichner's behavior. The Complainant objected directly to Mr. Eichner on at least one occasion concerning his remarks about women, brought complaints about his behavior and attitude to her supervisor on two occasions, and finally filed a written complaint of sexual harassment. The formal complaint provides clear evidence that the Respondent knew of at least certain aspects of the harassment,^{3/} thus satisfying the final prong of the prima facie

Since the Complainant established a marginal prima facie case, the burden of production shifts to the Respondent to articulate a legitimate,

3/ The Complainant never mentioned the face mask incident until the hearing. It thus is evident that the Respondent neither knew nor should have known of this incident.
non-discriminatory reason for its conduct and its treatment of the Complainant.^{4/}

The Respondent in this case in fact demonstrated legitimate, non-discriminatory reasons for its treatment of the Complainant and its

handling of her formal and informal complaints concerning Mr. Eichner. As noted above, employers may avoid liability for harassment committed by non-supervisory employees by taking timely, appropriate, remedial action. Minn. Stat. § 363.01, subd. 41 (1990); see also *Tretter v. Liquipak International, Inc.*, 356 N.W.2d 713, 715 (Minn. App. 1984); *Taylor v. Faculty-Student Association*, 40 Fair Empl. Prac. Cas. (BNA) 1292 (W.D.N.Y. 1986); *Ferguson v. E.I. duPont de Nemours & Co.*, 560 F.Supp. 1172 (D.Del. 1983). Once the Complainant's written complaint was received on September 7, 1990, the Respondent's Director of Human Resources, John Steenerson, promptly conducted a thorough investigation (which included interviewing nine individuals) and concluded based upon the investigation that inappropriate conduct had occurred. On September 21, 1990, only two weeks after the written

complaint was filed, Mr. Eichner received a memorandum from Mr. Steenerson which informed him that the jokes and comments he had made about women were "offensive," "totally inappropriate for a work setting," and had created "an unproductive and hostile environment." The memorandum warned him in stern terms that further incidents would result in his termination, and he was ordered to attend counselling to discuss work place behaviors.

Uncontradicted

evidence presented at the hearing indicated that the written complaint and resulting investigation brought an end to Mr. Eichner's offensive remarks about

women. In fact, the Complainant admits that she was completely satisfied with

the manner in which her written complaint was handled and agrees that Mr. Eichner did not engage in any further offensive conduct after the complaint was

filed. With respect to the written complaint, therefore, it is evident that the Respondent took "strong, swift action to separate itself from the harassment" and took steps to ensure that working conditions improved for the employee alleging the harassment. See *Tretter*, 356 N.W.2d at 715.

The Complainant contends, however, that her informal complaints about Mr.

Eichner in July and August of 1990 to her supervisor, Donna Franceschetti, should have resulted in earlier corrective action, the harassment should have ended at that point, and her written complaint in September thus should not have been necessary. It is true that the Respondent's sexual harassment policy

did not require that complaints of harassment be in writing. It is necessary,

however, to consider whether the Complainant's informal complaints to Ms. Franceschetti were sufficient to put the Respondent on notice that the Complainant believed that she was the victim of sexual harassment.

Conflicting evidence was presented during the hearing concerning the substance of the Complainant's oral complaints to Ms. Franceschetti.

Although

the Complainant testified that she informed Ms. Franceschetti of certain of

4/ As noted in 3 *Larson, Employment Discrimination* § 41.66(a) (1991), "sexual harassment cases do not fit the McDonnell Douglas mold perfectly." Several federal courts accordingly have modified the analysis of proof

appropriate in such cases. The Minnesota Court of Appeals, however, indicated in *Bersie_v._Zycad_Corp.*, 399 N.W.2d 141 (Minn. App. 1987), that the three-part McDonnell-Douglas analysis should be utilized in sexual harassment cases brought under the MHRA. the comments Mr. Eichner made about w

The credibility of the Complainant's version of what she told Ms. Franceschetti was significantly weakened by inconsistencies in her hearing testimony and discrepancies between her hearing testimony and the testimony she gave during her deposition just eleven days earlier. For example, the Complainant testified on direct examination that she told Ms. Franceschetti during the discussion in July that Mr. Eichner was putting women down and saying they were only good for one thing, but on cross examination agreed that she had not given Ms. Franceschetti any specifics. With respect to the August discussion with Ms. Franceschetti, the Complainant testified during the hearing that she informed Ms. Franceschetti of the "woman on the table," "barefoot and pregnant," and "my cunt" statements. In her deposition, however, the Complainant said that the only specific comment she relayed to Ms. Franceschetti was the comment Mr. Eichner made about making Barbara McHugo's life miserable if she came on the evening shift. Moreover, the Complainant's formal complaint identified the "my cunt" statement as being made on September 5, 1990, after the Complainant's second discussion with Ms. Franceschetti.^{5/} Due to these inconsistencies, the testimony of Ms. Franceschetti concerning the substance of the Complainant's oral complaints has been credited.^{6/}

Based upon the evidence presented at the hearing, the Administrative Law Judge has concluded that the informal complaints did not provide adequate notice of the Complainant's sexual harassment claim and that Red Cross

5/ Although the Complainant testified at one point during the hearing that she believed that the "my cunt" statement was actually made in late August, she also testified that the list of Mr. Eichner's remarks included in the last two pages of her formal complaint was compiled from a log she kept of things as they occurred, thereby suggesting that the September 5 date was correct.

6/ Certain other factors also entered into the determination that Ms. Franceschetti's account was more credible. For example, when Ms. Franceschetti mentioned to the Complainant following the filing of the written complaint that the Complainant had not previously told her any of the comments cited in the written complaint, the Complainant did not disagree. In addition, the Complainant's explanation that she waited to file the written complaint until

after Mr. Eichner was selected for a new position because she did not want it to look like she was trying to "go after him to get the job" would not make sense if the Complainant had already reported the details of the offensive conduct to her supervisor.

management did not have actual or constructive knowledge of the harassment allegations until the Complainant filed her written complaint on September 5, 1990. Under the circumstances, it was appropriate for Ms. Franceschetti to handle the Complainant's informal complaints by talking to Mr. Eichner. Indeed, the Complainant assented to such an approach. There is thus no convincing evidence that the Respondent knew or should have known of the sexual

harassment prior to the filing of the Complainant's written complaint in September, either through the Complainant's informal discussions with her supervisor or from any other source.

The Complainant also contends that the remedial action taken by the Respondent was in fact inadequate because she continued to be required to work

with Mr. Eichner and found that situation intolerable. As a result, she apparently contends that her resignation from her temporary position eleven days before it was scheduled to terminate in fact constituted a constructive discharge. There are several difficulties with this argument. First, the Complainant never asked that Mr. Eichner be discharged or that she or Mr. Eichner be transferred to another work station. In fact, she told Ms. Franceschetti that she did not want Mr. Eichner discharged, but just wanted him to

Third, the Complainant was very disappointed when she was notified in late

October 1990 that she had not been selected for a permanent Processing Medical

Laboratory Assistant position. She met with her superiors to discuss the reasons for their decision, and was unhappy when they refused to allow her to review certain information underlying the job selection decision. Just prior to her decision to quit her temporary position early, the Complainant had overheard a remark from a co-worker, David Peterson, referencing her failure to

be selected for the permanent position. It thus is likely that the Complainant's resignation did not arise out of the acts of sexual harassment perpetrated against her but rather from her unhappiness that she had not been selected for the Processing Lab position. Finally, there is no evidence that the Complainant's work conditions in fact were intolerable due to illegal discrimination prior to her resignation or that the Respondent's corrective actions had not been successful; to the contrary, there is every indication that Mr. Eichner had completely discontinued his offensive behavior. Based upon these factors, there is insufficient evidence to support a finding of constructive discharge. See *Biegner v. Bloomington Chrysler/Plymouth, Inc.*, 426 N.W.2d 483 (Minn. App. 1988) (where offensive comments had ceased several months before the plaintiff quit, the Court of Appeals found that the plaintiff's voluntary termination was not due to sexual harassment).

The Respondent demonstrated legitimate, non-discriminatory reasons for its treatment of the Complainant and its handling of her informal and formal complaints concerning Mr. Eichner, and established that it took timely and

appropriate action to remedy the sexual harassment once it learned of it.
The

Complainant did not establish that the Respondent's legitimate, nondiscriminatory reasons were a mere pretext for discrimination or show that she was constructively discharged from her position.^{7/} The Complainant's discrimination claim thus should be dismissed.

B.L.N.

^{7/} The Complainant offered evidence at the hearing that sexual harassment training by attorneys at Red Cross was conducted during 1987-89 as part of the negotiated settlement of a 1987 charge of sexual harassment, and offered Exhibits 15-17 relating to the settlement. After reviewing the proposed exhibits, the Administrative Law Judge agrees with the Respondent that these

documents are not relevant to the Complainant's complaint and that they should not be admitted into evidence in this case.